Glomac Resources Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-364–07 OF 2015
NANTHA BALAN J
6 MAY 2016

Civil Procedure — Judge — Application to recuse judge — Defendant sought recusal of presiding judge on ground judge and plaintiff's counsel were friends and had practised together as lawyers in same legal firm for several years — Defendant suggested impugned relationship gave plaintiff 'undue advantage' and affected fairness of trial — Whether mere fact plaintiff's counsel and presiding judge were friends or former work colleagues, without more, could give rise to real danger of bias and form basis to recuse judge

On the day fixed for the trial of the instant suit, the first defendant applied orally for the presiding judge to recuse himself on the ground he and the plaintiff's counsel were friends and were colleagues at work in a legal firm for several years before they went their separate ways. When the plaintiff objected to the application being made orally, the first defendant applied for an adjournment of the trial for a formal application to be filed. The plaintiff objected to the adjournment as it was ready to proceed with the trial. After hearing both parties, the court granted the adjournment and ordered the first defendant to pay the plaintiff RM7,500 as costs of the day in any event. In its formal recusal application, the first defendant submitted: (a) that neither the presiding judge nor plaintiff's counsel had made full and frank disclosure about their 'relationship' when counsel for both sides first appeared before the presiding judge in chambers for case management; (b) that the first defendant only came to know of the 'relationship' two days before the trial date; (c) that although plaintiff's counsel and the presiding judge had ceased to be colleagues at work, their 'relationship' had not ended; (d) that the 'relationship' could give an 'undue advantage' to the plaintiff and affect the fairness of the trial; and (e) that the presiding judge's 'punishment' of the first defendant in ordering it to pay the plaintiff RM7,500 in costs for granting the adjournment was a manifestation of bias.

Held, dismissing the recusal application:

(1) The first defendant's application did not pass the test of 'real danger of bias'. The mere fact counsel for the plaintiff and the presiding judge were at one time (about 13 years ago) partners in the same law firm, did not, without more, establish or give rise to a real danger of bias. Past

relationship between the presiding judge and counsel who were previously partners in the same law firm, per se, was not generally a disqualification or ground for recusal of the judge (see paras 27 & 41–42).

(2) In the present case, other than the fact that more than a decade ago plaintiff's counsel and the presiding judge were partners in a law firm and had continued to be friends, there was nothing to suggest that there was any sort of special relationship between them. The position of a judge appointed from the Bar or from the legal and judicial services was such that due to their previous professional background, they might know one or the other or both counsel and they could be friends. Friendship, per se, was not necessarily a disqualifying factor. The fact that the presiding judge and plaintiff's counsel were friends and were at one time partners in the same firm did not place the presiding judge in any awkward or embarrassing position as the presiding judge (see paras 30–31).

(3) Any suggestion that counsel who were friends of a presiding judge should not appear in a matter before him had to be deprecated as it implied that the judge would not be able to hear a matter fairly just because counsel for one of the parties was a friend. Judges were only beholden to their constitutional oath of office and were guided by the judges' code of ethics and their own conscience and moral compass. Judges in discharging their constitutional duties were blind and impervious to any underlying friendship or past association as partners or colleagues or acquaintances from legal practice (see para 29).

(4) Either the judge or counsel for a party should at the earliest possible date inform parties of any relationship which might give rise to bias. However, in the present case, the fact that the presiding judge had worked in the firm was not a fact which had to be declared. It was a matter of public record. There was no secrecy about it (see para 32).

(5) The order of costs made against the first defendant was clearly of its own doing when it brought up the topic of recusal by way of an oral application and thereafter sought an adjournment to make a formal application. Since the case was ready for trial and the parties and the court were ready to proceed, the first defendant was ordered to pay costs of the day for having caused the adjournment. Such an order would have been made against any party in a similar situation. It was untenable for the first defendant to take umbrage with the order of costs and suggest that it was a manifestation of bias (see para 34).

[Bahasa Malaysia summary

Pada hari yang ditetapkan untuk perbicaraan tindakan ini, defendan pertama memohon secara lisan untuk hakim bicara menarik dirinya atas alasan yang dia dan peguam plaintif adalah sahabat dan adalah rakan sekerja di firma

undang-undang bagi selama beberapa tahun sebelum mereka mengikut haluan masing-masing. Apabila plaintif membantah kepada permohonan yang dibuat secara lisan, defendan pertama memohon untuk penangguhan perbicaraan bagi permohonan formal difailkan. Plaintif membantah kepada penangguhan tersebut kerana ia telah bersedia untuk meneruskan dengan perbicaraan. Selepas mendengar kedua-dua pihak, mahkamah membenarkan penangguhan dan memerintahkan defendan pertama walau bagaimanapun membayar kepada plaintif sebanyak RM7,500 sebagai kos harian. Dalam permohonan formal menarik diri, defendan pertama berhujah: (a) bahawa hakim bicara ataupun peguam plaintif tidak membuat pendedahan penuh dan terus-terang mengenai 'relationship' mereka apabila peguam untuk kedua-dua pihak pertama kali hadir di hadapan hakim bicara dalam kamar bagi pengurusan kes; (b) bahawa defendan pertama hanya mengetahui mengenai 'relationship' dua hari sebelum tarikh perbicaraan; (c) bahawa walaupun peguam plaintif dan hakim bicara telah berhenti daripada menjadi rakan sekerja 'relationship' mereka tidak berakhir; (d) bahawa 'relationship' boleh memberikan 'undue advantage' kepada plaintif dan menjejaskan keadilan perbicaraan; dan (e) bahawa 'punishment' hakim bicara terhadap defendan pertama dalam memerintahkannya untuk membayar plaintif kos sebanyak RM7,500 bagi membenarkan penangguhan adalah manifestasi berat sebelah.

Diputuskan, menolak permohonan penarikan diri:

(1) Permohonan defendan pertama tidak lulus ujian 'real danger of bias'. Fakta semata-mata peguam bagi plaintif dan hakim bicara pada satu masa (lebih kurang 13 tahun yang lalu) rakan kongsi di firma undang-undang yang sama, tidak, tanpa lebih, membuktikan atau membangkitkan bahaya sebenar berat sebelah. Hubungan dahulu di antara hakim bicara dan peguam yang mana adalah sebelum ini rakan kongsi di firma undang-undang yang sama, itu sendiri, bukan secara umumnya penyingkiran atau alasan untuk penarikan diri hakim (lihat perenggan 27 & 41–42).

(2) Dalam kes ini, selain daripada fakta bahawa lebih sedekad yang lalu peguam plaintif dan hakim bicara adalah rakan kongsi di firma undang-undang dan berterusan menjadi sahabat, tidak terdapat apa-apa untuk mencadangkan bahawa terdapat apa-apa jenis hubungan istimewa di antara mereka. Kedudukan seorang hakim yang dilantik daripada Badan Peguam atau daripada perkhidmatan perundangan dan kehakiman adalah kerana latar belakang profesional mereka sebelum ini, mereka mungkin kenal satu atau yang lain atau kedua-dua peguam dan mereka boleh menjadi sahabat. Persahabatan itu sendiri, tidak semestinya faktor yang tidak melayakkan. Fakta bahawa hakim bicara dan peguam plaintif adalah sahabat dan pada satu ketika rakan kongsi di firma yang sama tidak meletakkan hakim bicara dalam apa-apa

kedudukan kekok atau memalukan sebagai hakim bicara (lihat perenggan 30–31).

(3) Apa-apa cadangan bahawa peguam yang mana adalah sahabat kepada hakim bicara tidak patut tampil di dalam perkara di hadapannya patut dikecam kerana ia menyiratkan bahawa hakim tidak dapat mendengar perkara secara adil hanya kerana peguam untuk salah satu pihak adalah sahabat. Hakim-hakim hanya terikat kepada angkat sumpah perlembagaan dan dibimbing oleh kod etika hakim-hakim dan suara hati dan skop moral mereka. Hakim-hakim yang menjalankan tugas-tugas perlembagaan mereka adalah buta dan lali kepada mana-mana dasar persahabatan atau hubungan lampau sebagai rakan kongsi atau rakan sekerja atau kenalan daripada amalan undang-undang (see para 29).

(4) Sama ada hakim atau peguam untuk pihak patut pada tarikh seawal mungkin memberitahu pihak-pihak mengenai apa-apa hubungan yang mungkin akan membangkitkan berat sebelah. Walau bagaimanapun, dalam kes ini, fakta bahawa hakim bicara telah bekerja di firma tersebut bukan fakta yang patut diisytiharkan. Ia adalah perkara rekod awam. Tidak terdapat kerahsiaan mengenainya (lihat perenggan 32).

(5) Perintah kos yang dibuat terhadap defendan pertama jelas akibat tindakannya sendiri apabila ia membangkitkan topik penarikan diri melalui permohonan lisan dan kemudiannya memohon penangguhan untuk membuat permohonan formal. Memandangkan kes telah bersedia untuk perbicaraan dan pihak-pihak dan mahkamah bersedia untuk meneruskan, defendan pertama diperintahkan untuk membayar kos pada hari itu kerana menyebabkan penangguhan. Perintah sedemikian akan dibuat terhadap mana-mana pihak dalam keadaan yang sama. Ia tidak dapat dipertahankan untuk defendan pertama tersinggung dengan perintah terhadap kos dan mencadangkan ia manifestasi berat sebelah (lihat perenggan 34).]

Notes

For cases on application to recuse judge, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 4805–4825.

Cases referred to

Dato' Dr Joseph Evarelly v Dato' Hilmi Mohd Nor & Ors [2011] 3 CLJ 294, HC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 2 WLR 870, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Michael Chow Keat Thye v Suruhanjaya Sekuriti Malaysia & Anor [2013] 10 CLJ 505, HC (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2001] 4 CLJ 701, FC (refd)
R v Gough [1993] 2 All ER 724, HL (refd)

Legislation referred to

Judges' Code of Ethics 2009 ss 5, 6, 7

Mohanadass Kanagasabai (Syarihah bt Razman with him) (Mohanadass Partnership) for the plaintiff.
Ilyani bt Noor Khuszairy (Zulkifli Yong Azmi & Co) for the first defendant.

Nantha Balan J:

(Enclosure 31)

INTRODUCTION

[1] These are my grounds in respect of an application for recusal by the first defendant ('encle 31'). The imperative question that arises in the context of the recusal application is whether the fact that the presiding judge and counsel appearing for one of the parties were partners in the same law firm more than a decade ago, is a ground for disqualification/recusal of the presiding judge.

REQUEST FOR RECUSAL

[2] The matter was fixed for trial on 22 March 2016 and 23 March 2016. The issue of recusal was brought up orally in open court on the morning of 22 March 2016 when the first defendant's counsel referred to a letter dated 21 March 2016 issued by Messrs Zulkifli Yong Azmi & Co to the plaintiff's solicitors, Messrs Mohanadass Partnership. The letter was sent on the eve of the trial ie on 21 March 2016 and it reads as follows:

> ... we have our client's instructions to state as follows:
>
> a. Our client has reason to believe that Mr Mohanadass was attached at Shook Lin & Bok as a Legal Assistant since 1991 and thereafter as a Partner since 1999, until his setting up of your esteemed firm in 2010.
>
> b. Our client has reason to believe, around that similar period of time, Yang Arif S Nantha Balan was also attached at Shook Lin & Bok as a Legal Assistant and/or Senior Legal Assistant and/or Partner before His Lordship continuation of career at Messrs Zul Rafique & Partners.
>
> c. Due to the above, our client therefore has reason to perceive that your Mr Mohanadass and Yang Arif Justice S Nantha Balan, being colleagues

for a vast number of years in the same legal entity, would give rise for our client to be concerned as to whether His Lordship should recuse himself from hearing the above matter.

Your goodselves would appreciate that justice should not only be done, but should manifestly and undoubtedly be seen to be done, and therefore, we seek your goodselves confirmation in avoiding the need to file any necessary formal application to that effect in order to avoid any unnessessary embarrassment for all parties having to be placed on record ...

[3] When the matter was brought up on 22 March 2016, I informed parties that Mr Mohanadass Kanagasabai, the plaintiff's counsel and I were indeed partners at Messrs Shook Lin & Bok ('the firm') for a period of time, until I left the firm at the end of January 2003.

[4] The plaintiff's counsel, Mr Mohanadass objected to the first defendant's recusal application being made orally. The first defendant's counsel then applied for an adjournment of the trial in order to file a formal application for recusal. Counsel for the plaintiff then objected to the adjournment as parties were ready to proceed with the trial. He pressed for costs of the day. Upon hearing both parties, I awarded that costs of the day in the sum of RM7,500 be paid (in any event) by the first defendant to the plaintiff.

[5] After the matter was adjourned, the first defendant filed a formal application for my recusal. The application for recusal ('encl 31') is predicated on the sole ground that the plaintiff's counsel, Mr Mohanadass Kanagasabai and I were partners in the firm for a period of time, until I left in January 2003.

[6] In the context of the test for bias, the question before me is whether a fair minded person, sufficiently apprised of all relevant facts would opine that there was a real danger of bias by reason of the fact that the presiding judge was previously a partner in the same law firm as counsel appearing for one of the parties.

[7] Consequently, it is relevant to ask whether because of the judge's familiarity with one of the counsel appearing before him, he would not be able to discharge his judicial duties in an impartial manner.

SUBMISSIONS

[8] Counsel for the first defendant started her submissions by relying on cll 5, 6 and 7 of the Judges' Code of Ethics 2009 which state as follows:

5 Upholding the integrity and independence of the judiciary

A judge shall exercise his judicial function independently on the basis of his assessment of the facts and in accordance with his understanding of the law, free

from any extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter or for any reason.

6 Avoiding impropriety and the appearance of impropriety in all judicial activities

(1) A judge shall not:

(a) *allow any relationship to influence his judicial conduct or judgment;*

(b) lend the prestige of his judicial office to advance his or others' private interest; and

(c) convey or permit others to convey the impression to any person that they are in a special position to influence him.

7 Performing judicial duties fairly and efficiently

(1) The judicial duties of a judge shall take precedence over all his other activities

(2) A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

(3) *A judge shall perform his judicial duties without bias or prejudice*.

(4) A judge shall dispose of all his judicial duties fairly, efficiently, diligently and promptly.

(5) A judge shall refrain from giving any public comment about pending or impending proceedings which may be heard before the judge's court in a manner which may suggest to a reasonable person the judge's probable decision in any particular case.

(6) A judge shall not disclose or use any non-public information acquired in his judicial capacity for any purpose unrelated to his judicial duties.

(7) A judge shall endeavour to diligently and efficiently hear and complete the cases in his court and promptly write his judgments.

(8) A judge shall not conduct himself in a manner which is not befitting of a judge or which brings or is calculated to bring disrepute to his office as a judge. (Emphasis added.)

[9] Next, counsel submitted that in deciding whether a judge should recuse himself or not, the test that had been formulated by the Malaysian and English courts is whether there exists 'a real danger of bias'. This test had been laid down in the following cases:

(a) *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870 (CA);

(b) *R v Gough* [1993] 2 All ER 724 (HL);

(c) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (FC);

(d) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701 (FC); and

(e) *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 (FC).

[10] Counsel for the first defendant also emphasised that there was no full and frank disclosure of the relationship that exists between counsel for the plaintiff, Mr Mohanadass Kanagasabai and I, since the first time counsel for both sides appeared before me in chambers on 5 November 2015 (for case management).

[11] Counsel for the first defendant said that the relationship was not that of a normal relationship between a partner of a law firm and a legal assistant of the same law firm, but it is more than that. She said that the plaintiff's counsel and I were partners in the firm for a considerable period of time.

[12] Counsel for the first defendant said that they were only made aware of the relationship two days before the trial date, which was on 20 March 2016. She also said that the cessation of the link between the plaintiff's counsel and I as partners of the firm in 2003 does not mean that the relationship has come to an end.

[13] Counsel for the first defendant said that it is the duty of the court and/or that of counsel for the plaintiff to make the requisite declaration of the previous relationship as partners and that parties and their solicitors are not expected to do research into the background of opposing solicitors or that of the presiding judge.

[14] The next point that counsel for the first defendant articulated is that the award of cost of RM7,500 (to be paid in any event) that was made against the first defendant on 22 March 2016 is an example of bias and a form of punishment against the first defendant.

[15] Lastly, counsel said that the relationship that exists between plaintiff's counsel and I could give an undue advantage to the plaintiff, and may affect the fairness of the trial. In this regard, reference was made to the case of *Dato' Dr Joseph Evarelly v Dato' Hilmi Mohd Nor & Ors* [2011] 3 CLJ 294, where the late Justice VT Singham had declared at p 307 as follows:

> On the other hand, I will not rule out that there could still be the *perception* of the litigant, in the present case, the defendants, that I may not be impartial and this doubt may still be lingering in the defendants' mind and that perception surely is not good for the integrity of this sacred seat that I occupy. Therefore, I must confess that as a result, I am agreeable to recuse myself from hearing this case in order to preserve the integrity and reputation of the judge, and that it will not be doubted

> under any circumstances. I must say that I am not and will not agree to recuse myself from hearing a case under any treat, fear or pressure imposed upon me but I must confess and wish to reiterate that I have come to this decision in order to maintain the integrity of this sacred seat that I occupy ... (Emphasis added.)

[16] For the plaintiff it was submitted that the first defendant has failed to show that the partnership between Mr Mohanadass Kanagasabai and I, which terminated 13 years ago could give rise to bias in any shape or form.

[17] Elaborating further, counsel submitted that he and I were partners in the firm together with at least 20 other partners and that I ceased to be a partner 13 years ago. He said this cannot of itself be a sufficient ground for the recusal application to succeed. In particular, counsel submitted that the first defendant has failed to show any conflict of interest and/or that there is a real danger of bias such as to preclude this court from hearing and/or determining the matter.

[18] On the issue of bias, counsel referred to the decision of the Court of Appeal in the case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 at p 901 where the court held (per curiam) that:

> It is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

[19] Counsel referred in particular to Justice NH Chan's judgment when he went on to enunciate the following points relating to bias:

> [1] Unless a judge has a direct pecuniary or proprietary interest in the subject matter of a proceeding, the law will not assume bias on the part of the judge. To allege bias, therefore, there must be circumstances upon which suspicion could be grounded that the judge would appear to be bias. The proper test is whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have ground to suspect that a fair trial would not be possible.
>
> [2] There was no ground here for a reasonable and fair-minded on-looker knowing all the relevant facts to suspect or to have any reasonable fear that a fair hearing would not be possible before this judge at the trial. Just because the judge had commented adversely on the credibility of the evidence before him in an interlocutory proceeding does not mean that he will not decide the case on the evidence adduced before him at the trial. The judge should not have disqualified himself.

[20] In so far as the costs of RM7,500 which was allowed on 22 March 2016, counsel for the plaintiff submitted that the award of costs cannot be perceived as punishment against the first defendant and that this is an unfair and

unreasonable allegation to make against the court. Counsel for the plaintiff further submitted that it was well within this court's discretion to make the order as to costs against the first defendant for having forced an adjournment of the two days trial as a result of its late oral application on the morning of the trial.

ANALYSIS AND CONCLUSION

[21] The recusal application in its present form has wide implications and ramifications to the administration of justice in this country. It raises an obvious practical problem and is one that affects or impacts upon members of Judiciary regardless of whether they are appointed from the practising Bar or from the legal and judicial services.

[22] The basis upon which the recusal is sought, if taken to its logical conclusion, would mean that judges should not hear matters where counsel or the federal counsel/senior federal counsel appearing before them were at one time their colleague, whether from the same law firm or from the Attorney General's chambers.

[23] In this regard, it is interesting to note that the Judiciary in England and Wales does not view past association as an impediment to a judge's ability to discharge his or her duty impartially and this is expressed quite clearly in Part 7.2.4 of the Chapter on 'personal relationships and perceived bias' in the *Guide to Judicial Conduct 2013* published by the Judiciary of England and Wales where it states that:

> 7.2.4 Friendship or past professional association with counsel or solicitor acting for a party is not generally to be regarded as a sufficient reason for disqualification.

[24] In this regard, I find that the following passage from the judgment of the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 2 WLR 870 (CA) also supports the proposition that past professional association per se is not a reason for disqualification:

> 25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge.
>
> *Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews,*

reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. (Emphasis added.)

REAL DANGER OF BIAS

[25] It bears repeating that ultimately the question is whether there is a 'real danger of bias'. In the seminal case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 at p 69 the Federal Court enunciated that the applicable test for recusal is 'the real danger of bias' test. The following passage from the judgment of the Federal Court is instructive on this point:

The conflict of judicial opinion appears to have been resolved by the House of Lords in *R v Gough* [1993] AC 646 when the House applied 'the real danger' of bias test in a criminal case, where a juror had recognised the accused's brother as her next door neighbour, but this was not until after the verdict and it was held that there was no real danger of bias. Lord Goff, speaking for the House, made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors or with arbitrators.

Explaining the 'real danger' of bias test, Lord Goff put it this way (at p 670 F):

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard '(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ...'.

Lord Goff went on to substitute 'the opinion of the Court' for Lord Denning's 'reasonable people' in Lannon. Here is what he said on this point:

> ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

The 'real danger' test favoured in Gough could be seen as a compromise between 'the reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress that the court is contemplating a lower standard than' likelihood' or 'probability of bias', that is to say, a 'real possibility of bias': see Gough at pp 668C-D, 670E-F, per Lord Goff; p 671B-C, per Lord Woolf.

It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v Gough per Lord Goff* , at p 670D-E).

Having given careful consideration to the matter, we prefer the test of apparent bias given in Gough ('the real danger of bias' test) as this will avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias.

[26] The real danger of bias test was subsequently followed by the Federal Courts in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701 and *Dato' Tan Heng Cheow v Tan Kim Hor* [2006] 2 MLJ 293.

[27] Of course, all of the above principles or judicial pronouncements are not carved in stone and are rules of general application and there could well be (and indeed there must be) exceptions to these rules and this will in turn depend on the particular facts of each case. But the starting point is that past relationship between the presiding judge and counsel who were previously partners in the same law firm per se, is not generally a disqualification or a ground for recusal of the judge.

[28] Counsel for the first defendant appears to suggest that the 'relationship' has not ended, albeit that both of us, ie counsel for the plaintiff and I have both left the firm. This appears to be rather cryptic and I am unable to fathom as to what exactly is being suggested. But if it is suggested that both of us are still friends, then I will say quite unequivocally that counsel for the plaintiff and I are still friends.

[29] But, if the implicit suggestion by the first defendant is that counsel who are friends of the judge should not appear in a matter where the judge is presiding, then I must register my utmost deprecation to such a suggestion as it implies that the judge will not be able to hear a matter fairly merely because counsel for one of the parties happens to be a friend. In this regard, it is imperative for me to emphasise in no uncertain terms that judges are only beholden to their constitutional oath of office and are guided by the judges code of ethics and lastly by their own conscience and moral compass. They are not beholden to their friends. Hence, if counsel appearing before any judge harbours an expectation or hope that rulings will be in his favour because of a friendship, then he is a friend not worth having and in any event, it will be misplaced hope on the part of the friend, as judges in discharging their constitutional duties, are blind and impervious to any underlying friendship or past association as partners or colleagues or acquaintances from legal practice.

[30] As for a judge's familiarity with counsel appearing before him, it is obvious enough that the position of the judge who is appointed from the Bar or from the legal and judicial services is such that due to their previous professional background, they may know one or the other or both counsel. In some cases the judge may know counsel very well and they could be friends. But as I have stated earlier, friendship per se, is not necessarily a disqualifying factor.

[31] Again, it is dangerous to generalise and I must allow room for the possibility that there may be situations where the relationship between the judge and counsel may have gone beyond ordinary friendship and they may have a special bond or relationship which could put the judge in an awkward or embarrassing position. There are a myriad situations and all types of examples could be given where such awkwardness may arise. But in the present case, other than the fact that more than a decade ago counsel for the plaintiff and I were partners in the firm and continue to be friends, there is nothing to suggest that there is any sort of special relationship which I have with counsel for the plaintiff. Hence, the fact that the plaintiff's counsel and I are friends and that we were at one time partners in the same law firm does not, in my view place me in any awkward or embarrassing position as the presiding judge.

[32] As for the issue of declaration of the past relationship as partners, I agree that either the judge or counsel for the party should at the earliest possible date inform parties of any relationship which may give rise to bias. But here, I do not see what it is that had to be declared as the fact that I had worked in the firm is a matter of public record. There is no secrecy about it. To my mind, that is not a fact which had to be declared. At any rate, our past relationship as partners in the same law firm per se does not, in my view, give rise to bias.

[33] The last point is with regards to the order of costs which was made against the first defendant on 22 March 2016. Here, it was clearly the first defendant's own doing when they brought up the topic of recusal by way of an oral application and thereafter sought an adjournment to make a formal application. Since the case was ready for trial and the parties and the court were ready to proceed, there will obviously be costs associated with the adjournment.

[34] Hence, since it was at the behest of the first defendant that the trial was adjourned, they were rightly ordered to pay costs of the day for having caused the adjournment of the trial. Indeed, such an order would have been made against any party who was in a similar situation. It is therefore untenable for the first defendant to take umbrage with the order of costs and suggest that it is a manifestation of bias.

[35] In so far as the approach to be taken when a recusal is sought, it is clear that when an objection is taken then the judge must deal with it and he must have regard to the general guidelines as to the circumstances that may give rise to disqualification. At the same time, the judge must have due regard to his duty to diligently hear the case that is assigned to him. The factors which would generally inform a judge's decision as to whether he should recuse himself were succinctly discussed in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870 (CA), where the Court of Appeal said:

> 21. In any case giving rise to automatic disqualification on the authority of *Dimes and Pinochet (No 2)*, the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with a last-minute choice between adjournment and waiver of an otherwise valid objection. If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. *If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.* We find force in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (7) BCLR (CC) 725 at p 753, even though these observations were directed to the reasonable suspicion test:
>
> > It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge

has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

22. We also find great persuasive force in three extracts from Australian authority. In *Re JRL, ex parte CJL* (1986) 161 CLR 342 at p 352, Mason J, sitting in the High Court of Australia, said:

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

23. In *Re Ebner* [1999] FCA 110, the Federal Court asked (in para 37):

Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by the setting aside of a judgment on the ground that the judge is disqualified for having such an interest?

24. In the *Clenae* case, above, Callaway JA, at para 89(e) of the judgment, observed:

As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application ... (Emphasis added.)

[36] The essence of the judgment of the English Court of Appeal in the *Locabail* case is that a presiding judge must hear all cases diligently and should not readily accede to recusal applications, save in the most compelling circumstances.

[37] In this regard, recusal applications are an exception rather that the rule. But when the situation presents itself and sufficient grounds are shown, then it is axiomatic that a presiding judge must not hesitate to recuse himself. To underscore this point, I should add that I have in the past, recused myself in several cases on application by the parties and in some cases, on my own volition.

[38] As I stated earlier, appointees to the bench may come from the Bar or the legal and judicial services. Some appointees to the bench may even be former officers of regulatory bodies. At times, a question may arise, whether it is appropriate for an appointee from a regulatory body, to hear a case where the said regulatory body is a party.

[39] In this regard, it is useful to have regard to the case of *Michael Chow Keat Thye v Suruhanjaya Sekuriti Malaysia & Anor* [2013] 10 CLJ 505 (HC) which is both interesting and instructive on the issue of recusal. In that case a shareholder applied for judicial review with respect to a ruling that was made by Suruhanjaya Sekuriti Malaysia. The presiding judge in that case was Abang Iskandar J (as he then was) and he was previously employed by Suruhanjaya Sekuriti Malaysia as its head of enforcement/prosecution. But he declined to recuse himself in circumstances where an objection was taken that he had not declared that he was at one time employed by Suruhanjaya Sekuriti Malaysia. The decision of the learned judge in that case to refuse a recusal was upheld by the Court of Appeal. I will quote from a passage in the judgment of the High Court which reads as follows:

> To my mind from that *Locabail*'s case, *it is clear that past associations including a mere past history of employment is never sufficient as valid ground to premise an objection founded on a real danger of bias on the part of the judge*. In addition to that past association, there must be a clear nexus between the judge and the circumstances surrounding the making of the impugned decision before a duty to disclose arises for him to appraise the parties before him of his role in the impugned decision. In this case presently before this court, it was not only remote, there was no inkling, neither was there an iota of evidence, to even form any basis upon which any form of relationship could possibly be conjured between the judge and the first respondent of a nature which would render it capable of being construed as one that had posed a real danger of bias on the part of the judge such that his capacity to hear this case wholly untenable and such that he must recuse himself accordingly. The fact of the matter is that, in my considered view, there is nothing in the whole scheme of things pertaining to this case, which would have obligated the judge to disclose to the parties of the fact that he was at one point of time in his career in the employment of the first respondent. (Emphasis added.)

[40] I referred to the case of *Michael Chow* only to demonstrate that the judge's past association with the Suruhanjaya Sekuriti Malaysia (as its head of enforcement/prosecuting) was not of itself a ground to recuse him from hearing a case involving the Suruhanjaya Sekuriti Malaysia whose decision came under curial scrutiny, albeit by the presiding judge who was their previous employee. Consequently, the view that I take is that if the threshold for real danger of bias could not be established in the *Michael Chow*s' case, then it follows by parity of reasoning that there cannot be a real danger of bias in the present case where the recusal is predicated merely on the fact that more than a decade ago plaintiff's counsel and I were partners in the same law firm. It

might be different if the firm or one of the partners of the firm was before me as a party. As such, I am impelled to the view that the mere fact that counsel for one of the parties was a partner in the same firm together with the presiding judge, does not give rise to a real danger of bias.

[41] In the result, based on the principles of law relating to recusals and upon a due consideration of the grounds advanced by the first defendant and the arguments that were presented by counsel, I am of the opinion that the mere fact that counsel for the plaintiff and I were at one time (about 13 years ago) partners in the same law firm, does not, without more, establish or give rise to a 'real danger of bias'.

[42] As such, I am of the view that the first defendant's application for recusal does not pass the test of 'real danger of bias' and the first defendant's application ('encl 31') is accordingly dismissed. I make no order as to costs.

Recusal application dismissed.

Reported by Ashok Kumar